UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 17

STAHL SPECIALTY COMPANY

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL #1464 affiliated with the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Case No. 17-CA-088639

RESPONDENT STAHL SPECIALTY COMPANY'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46(h) & (j) of the Rules and Regulations of the National Labor Relations Board ("the Board"), Respondent Stahl Specialty Company hereby replies to the Answering Brief of the Counsel for the General Counsel[1].

I. The Issuance of the Complaint in This Matter and ALJ's Decision Remain Invalid.

The Supreme Court recently granted certiorari indicating that it will review the circuit court's opinion in *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), *cert. granted* 2016 WL 1381487 (June 20, 2016). Despite that, *SW General*'s reasoning presently stands and supports a conclusion that the Acting General Counsel lacked authority to issue the Complaint and authorize proceedings in this matter given the circumstances of his appointment and the provisions of the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. §§ 3345 *et seq*. Moreover, Counsel for the General Counsel's arguments (1) that the General Counsel, the Board, and the ALJ's post-facto ratifications cured any impropriety and (2) that the ALJ "fully reviewed" and determined on the entire record that her prior decision remains correct and deserving of ratification in its entirety are belied by the ALJ's failure to remedy the error described in Respondent's Exception 127—in which the ALJ found as a fact that the General Counsel introduced no evidence to support an allegation in the complaint but nonetheless concluded that the Respondent committed that alleged violation. Far from being a mere "mistaken inclusion," this purported ratification of an erroneous substantive finding of a violation of Section 8(a)(1) of the Act: (1) rebuts any presumption of regularity that might have applied to the ratification and review process employed by General Counsel, the Board, and the ALJ, and (2) constitutes substantial evidence that their actions in this case were nothing more

[1] Charging Party did not file an answering brief during these renewed proceedings. Therefore, its prior arguments have not been properly preserved. To the extent that any prior briefing by Charging Party might be considered, its prior Answering Brief adopted and incorporated Counsel for the General Counsel's Answering Brief (*see* pp. 1, 9). Thus, Respondent will refer to any and all possibly applicable Answering Briefs as "G.C. Br."

than rubberstamping and blind affirmations without due consideration—conduct that fails to satisfy the requirements for ratification even under the authority cited in Counsel for the General Counsel's Answering Brief. *See Advanced Disposal Servs. E., Inc. v. NLRB*, 2016 WL 1598607, *6 (3d Cir. Apr. 21, 2016) (noting that among other requirements, a ratifier "must make a detached and considered affirmation of the earlier decision" and that this requirement is intended "to ensure that the ratifier does not blindly affirm the earlier decision without due consideration"). Accordingly, the ALJ's Decision and Recommended Order should be rejected, and the General Counsel's Complaint should be dismissed in its entirety.

II. Respondent Clearly Met Its *Wright Line* Burden of Production With Regard to Armstrong's Termination.

When questioned about his failure to run a machine as instructed on the night of August 26-27, 2012, Armstrong told Respondent that he was "too busy" performing other tasks and that there were no parts available for the machine he was instructed to run. *See, inter alia,* Tr. 270:16-17, 283:8-9, 592:24-25, 595:5-6. When Respondent investigated and found that the tasks Armstrong claimed to have performed could not account for all hours he worked on his shift, Respondent terminated Armstrong's employment for negligence of assigned duties and making false reports. Resp Ex. 6. Counsel for the General Counsel incorrectly argues, and the ALJ incorrectly found, that "Respondent was motivated to discharge Armstrong because of his union activity." G.C. Br., p. 25. However, Respondent thoroughly investigated Armstrong's claims and reviewed his personnel file as required by its progressive disciplinary policy before terminating Armstrong's employment. Respondent has presented substantial evidence that it would have terminated Armstrong even absent his concerted activity, thus providing a non-pretextual justification for his termination.

A. Respondent Investigated Armstrong's Claims.

Counsel for the General Counsel first contends, incorrectly, that "Respondent did no investigation prior to making the decision to terminate Armstrong." G.C. Br., p. 25. To the contrary, the ALJ devoted three pages of her decision to an extensive discussion of the multiple investigations Respondent *did* conduct. Order at pp. 14-16. Nevertheless, the ALJ found that Respondent "deliberately conducted an inadequate investigation into the charges against Armstrong to justify terminating him." *Id.* at 19. However, *American Crane Corp.*, 326 NLRB 1401 (1998) and *Relco Locomotives, Inc.*, 358 NLRB No. 37 (2012) upon which the ALJ relied to find that Respondent did not adequately investigate Armstrong's activities, can be easily distinguished. *See* Order at p. 20.

In *American Crane*, the employer lied to a discharged employee during the termination meeting and never gave the employee an opportunity to explain his actions. *Id.* at 1414. In *Relco*, the ALJ predicated a finding that the employer's reason for termination was pretextual on the "inconsistent testimony" of the employer's "officials" and their "lack of recall" as to the true reason for the employee's termination. 358 NLRB at 49. By contrast, in the instant case, Respondent's supervisors testified consistently about the reason for Armstrong's discharge and remembered their deliberative process quite clearly. *See, e.g.*, Tr. 655:4-12, 792:7-17; Charging Party Ex. 8, Resp. Ex. 8. Furthermore, while a complete failure to investigate alleged misconduct can be strong evidence of pretext, *Rood Trucking Co.*, 342 NLRB 895, 899 (2004), that situation does not obtain in this matter.

1. Armstrong's Excuses Are Not Borne Out by Respondent's Investigations.

The issue is not that Armstrong failed to do all of the things he claimed to have done: Respondent has never disputed that he fixed Timmons's scribe, emptied some chip hoppers,

buffed a few Hubbell handles, or drove a fork truck. The issue is that, combined, nothing Armstrong claimed to have done could have taken all 8.58 hours he logged on his shift. Charging Party Ex. 6. In other words, nothing Armstrong did could have taken enough time to justify his initial excuse that he "too busy" to carry out the orders he had received.

Armstrong claimed he was engaged in numerous other activities, including emptying chip hoppers and buffing handles, and that he could not run the A81 machine because there were no parts available. During Respondent's first investigation into Armstrong's claims, Stewart spent about fifteen minutes "look[ing] at every one of the machines and noticed that none of them had been emptied." Tr. 593:19-22, 615:21-23, 667:23 – 668:2. He also picked up a random sampling of Hubbell handles to determine how many had been buffed, as it is "very obvious when one has been buffed and one has not," and found that only about 15 to 20 of the 400 available handles had been buffed. Tr. 594:1-4, 594:24 – 595:6, 611:10-12. It takes about ten minutes to buff 15 to 20 handles. Tr. 594:3-4. When faced with the fact that there were at least two machines Armstrong could have run, he claimed that there were no Volvo parts to run on the A81, he did not know how to change over the A81 to run Mercury parts, and all of the available parts to run on the SH1 were "scrap." Tr. 272-:15-18.

Armstrong testified that he tried to run Hubbell handles on the SH1 machine, but could not. Tr. 272:2-9. Hubbell handles are first buffed, then sent to the wheelabrator, then returned to his department for machining. Tr. 273-274. He further testified that on August 26-27 there were Hubbell handles in the machining department in "various stages of their process," *i.e.*, that there were some that had been buffed, wheelabrated, and were ready to be machined. Tr. 273:20-22. Yet instead of machining them on the SH1—*i.e.*, instead of taking this opportunity to run a machine as he had been explicitly instructed—he decided to rebuff other handles that were only

in the buffing, pre-wheelabrating stage of the process. Stewart testified that there were about 400 handles in the machining department during C shift. Tr. 549:25 – 596:2. Instead of finding and machining any of the 400 handles that, in his opinion, *did* meet specifications, Armstrong just rebuffed a few handles for a few minutes and claimed that most of them were scrap. Therefore, even if it were true that there were no Volvo parts for the A81 (as is disputed by the fact that the parts were run during the A shift that immediately followed on the morning of August 27), and even if it were true that Armstrong did not know how to switch over the A81 so that he could run Mercury cradles on it, the SH1 was both operational and had parts.

2. An Interview of Other C Shift Employees Was Unnecessary.

Counsel for the General Counsel makes much of the fact that Venkatesan and Stewart did not interview other C shift employees. *See* G.C. Br., p. 25-27. However, this argument is a red herring: there was nothing Venkatesan or Stewart could have learned from the other C shift employees that they could not have learned from their own observation, as was made evident at the hearing. As Respondent has made abundantly clear, and as Counsel for the General Counsel has not attempted to refute, interviews of the other C shift employees would have revealed exactly what they testified to at the hearing: namely, that none of them was in a position to observe all of Armstrong's activities for the entirety of C shift, and therefore none of them could corroborate his story that he was "too busy" to follow orders.

For instance, the ALJ's own factual findings note that: Ridge could see only half of the machining department and only "occasionally" saw Armstrong driving the forklift (Order at p. 19); Meade only saw Armstrong driving the forklift and sweeping (*Id.*). It took 75 minutes, not 8.58 hours, to fix Timmons's scribe (Tr. 341:10-20).[2] Based on C-shift employees' own

[2] This is a generous interpretation based on witnesses' testimony. The ALJ found that it took "more than an hour" to fix the scribe. Order at p. 20.

testimony, it took at most 45 minutes, not 8.58 hours, to buff the few Hubbell handles Armstrong claimed to have buffed (Tr. 348:4-7, 352:7-14). It took at most 50 minutes, not 8.58 hours, to empty chip hoppers (Tr. 343:10-17). It took about an hour, not 8.58 hours, to drive the fork truck during C shift (Tr. 359:3-12, 361:22 – 362:2). This testimony was elicited from the exact C shift employees Respondent "failed" to interview, according to the ALJ. After four days of hearing, no witnesses were able to explain why, as Armstrong claimed, he was "too busy" and "didn't have time" to run a machine when he could not account for approximately four hours of his shift.

3. Respondent Followed Its Progressive Disciplinary Policy During the Follow-Up Interview by Human Resources.

As the ALJ already found, the Handbook explicitly states that Respondent "reserves the right to determine appropriate level of action to be taken on a case by case basis in consideration of the circumstances involved." Order at 15. This includes "skipping" steps in its progressive disciplinary policy. Step 4 of Respondent's Progressive Disciplinary Policy, "Termination of Employment," requires an investigation, review of the employee's personnel file, and the approval of both the Human Resources department (Wilkins) and the Plant Manager (Venkatesan). G.C. Ex. 3 at p. 48.[3]

Relying on *2 Sisters Food Group* 357 NLRB No. 168 (2011), Counsel for the General Counsel incorrectly states that "Respondent provided no evidence" to justify its decision to bypass steps in its progressive disciplinary policy and move directly to termination. G.C. Br., p. 34. To the contrary, Respondent submitted evidence that the President of the company, the head of Human Resources, and the Plant Manager discussed Armstrong's disciplinary record at length for at least two days. *See, e.g.,* Resp. Ex. 8. Respondent also presented the documented

[3] Counsel for the General Counsel inexplicably argues that Respondent "refused to reverse its conclusions even after its conclusions had been challenged by new information." G.C. Br., p. 35. However, Wilkins testified that she "reversed" her initial reaction that Armstrong should not be immediately terminated after learning of his complete disciplinary history, *i.e.,* the other warnings in his file.

verbal warnings for substandard production found during its review of Armstrong's personnel file. If Respondent was so keen to terminate Armstrong instantly, it would have acted immediately on Venkatesan's gut reaction. However, Respondent first suspended Armstrong, then reviewed his file, then moved to termination. Respondent's investigation certainly does not rise to the level of inadequacy sufficient to support an inference of union animus, and the ALJ's findings on this issue are due to be reversed.

4. Respondent Reasonably Believed Armstrong Had Neglected His Duties and Made False Reports About His Activities.

Counsel for the General Counsel points to *2 Sisters Food Group,* finding "inadequate investigations" to be evidence of union animus, but it is inapposite here. In *2 Sisters Food Group,* the Board found union animus where an employer failed to interview witnesses to an altercation between the terminated discriminatee and another employee and failed to follow internal policies much more detailed and stringent than those in operation at Respondent's plant in the instant matter. Also in *2 Sisters*, the terminated discriminatee was not given an opportunity to explain her behavior, whereas Armstrong explained his actions to Stewart on August 27 (Tr. 284-285), to Venkatesan by phone on August 28 (Tr. 286:2-8), and a third time during his termination meeting (Tr. 288:20 – 289:9).

Respondent has proven its reasonable belief that Armstrong had committed the offense (negligence of duties and making false reports) and acted on that belief by terminating his employment. *McKesson Drug Co.,* 377 NLRB 935, 936-937 n. 7 (2002). Armstrong's dereliction of duty meant that Respondent was unable to produce more parts for a customer for whom they were trying to expedite production. This kind of underperforming behavior by Armstrong was not unprecedented, such that yet another "first" documented verbal warning was

in order. Armstrong had received multiple prior warnings about underproduction on his shift and underproduction by him personally. *See, e.g.,* Resp. Ex. 6.

Furthermore, the ALJ failed to make any credibility finding about the testimony of Charles Collins, who corroborated Stewart's testimony regarding Armstrong's instructions that Collins purposefully underproduce parts so that other employees wouldn't be expected to be as productive. Regardless of the ALJ's opinion of Stewart's credibility, Respondent is entitled to a credibility ruling on Collins specifically, as he directly contradicted Armstrong's flat denial of this conversation. The ALJ considered the testimony of and made findings about every other single witness at the hearing *except* Collins. Collins's testimony provides additional support for Respondent's reasonable belief that during C shift on August 26-27, 2012, Armstrong yet again took an opportunity to lower Respondent's production, in this instance on a crucial production weekend. His behavior in this instance was directly in line with multiple documented incidents over the preceding year and corroborated testimony concerning his general attitude toward Respondent's production expectations.

III. Respondent's Response to the Union Organizing Campaign Does Not Constitute Animus Sufficient to Support a Finding of Pretext for Armstrong's Termination.

Counsel for the General Counsel relies upon *Photo Drive Up*, 267 NLRB 329 (1983), for its contention that the "immediacy" of Respondent's response to the union organizing campaign show animus. G.C. Br., p. 23. However, not only did the ALJ not rely upon "immediacy" for her findings, but neither did the Board in *Photo Drive Up.* In that case, an employee was terminated for violating a no-solicitation rule posted merely one day before her termination. *Id.* at 360. The employer in that case tried to argue that the termination was not pretextual, even though the employee was terminated for violating rules directly related to engaging in union activities during work time, and even though the employer did not give the employee an opportunity to

explain her actions. *Id.* at 361. The Board acknowledged in *Photo Drive Up* that "[the employer's] belief that [the employee] had violated a posted policy rule and a supervisor's instructions would, under normal circumstances, constitute sufficient justification for employee discipline." *Id.* The instant case presents precisely such "normal circumstances": Armstrong was not terminated for violating a rule implicating union activity, and he was given three opportunities to explain his actions.

IV. The ALJ's Findings Regarding Respondent's Remaining 8(a)(1) Violations Are Also Due to Be Reversed.

The ALJ also erroneously found that Respondent violated Section 8(a)(1) of the Act by engaging in unlawful surveillance, threatening facility closure, interrogating Armstrong about his union activities, and posting a flyer threatening permanent job loss. Counsel for the General Counsel has offered no new arguments for why these findings should not be reversed.

To constitute *unlawful* surveillance, an employer's observations must be more than "merely casual in nature" and amount to a "deliberate attempt to interfere with the legitimate union activity of employees." *Brown Trans. Corp. v. N.L.R.B.,* 294 N.L.R.B. 969, 971 (1989). Neither Venkatesan's nor Adams's observance of union handbilling interfered with employees' union activity, as evidenced by the fact that the union continued to handbill for months.

Spalding's speech contained true statements about Respondent's parent company's business preferences. *See, e.g., N.L.R.B. v. Flemingsburg Mfg. Co.,* 300 F.2d 182 (6th Cir. 1962) (plant manager's statement, during organizing campaign, that labor costs would increase and there would be no purpose for its sole customer to continue to send its work to the plant if the union came in was exercise of free speech right and did not constitute unfair labor practice); *Grede Foundries, Inc.,* 205 N.L.R.B. 39 (1973) (statement by president to employees during organizing campaign that the only way to prevent plant from closing was to keep customers

satisfied did not violate the Act).[4] His remarks did not rise to the level of those found unlawful in Counsel for the General Counsel's cases. *See, e.g., Dorsey Trailers, Inc. Northumberland, PA Plant*, 327 NLRB 835, 850-851 (1999), G.C. Br., p. 45 ("Marks will close it down, she has no time to waste on you people negotiating a contract" and "she will close the plant down, and that's not a threat, it's a promise").

Furthermore, there is no 8(a)(1) violation where "The supervisor made no threats nor intimated that [an employee] might be subject to reprisal because of her union activities. When [the employee] said she could not remember requested information, the supervisor did not press the matter. No attempt was made to interrogate [the employee] about the union sympathies of other employees." *N.L.R.B. v. Seamprufe, Inc.*, 382 F.2d 820, 821 (10th Cir. 1967). Stewart's questioning of Armstrong after the July meeting did not rise to the level of interrogation.

Finally, as the Fourth Circuit found in *Pirelli Cable Corp. v. N.L.R.B.*, 141 F.3d 504 (4th Cir. 1998), "[a]n explanation of the possible results of labor/management tensions does not become threatening or coercive merely because it is in plain English rather than in legal jargon." While it is true that the challenged flyer does not explicitly lay out strikers' *Laidlaw* rights, when taken in context its language clearly shows that Respondent was referring only to economic strikers. *See, e.g., Laidlaw Corp.,* 171 N.L.R.B. 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). The ALJ's findings on these charges are due to be reversed.

V. Conclusion

For the reasons set forth above, the ALJ's decision and recommended order should be rejected in their entirety.

[4] In addition, two cases Counsel for the General Counsel cites for an "objective standard . . . under the totality of the circumstances," *Sunnyvale Medical Clinic,* 277 NLRB 127 (1985), and *Rossmore House,* 269 NLRB 1176 (1984), pertain to the standard for finding unlawful *interrogation,* not unlawful threat of closure. G.C. Br., p. 45.

DATED: June 29, 2016

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Exceptions to the Decision of the Administrative Law Judge were served on all parties listed pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Office of the Executive Secretary and email on this the 29th day of June 2016.

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